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16 *Antonio J. Gracias, James Murdoch, Kimbal Musk,*

and Linda Johnson Rice

17 UNITED STATES DISTRICT COURT

18 NORTHERN DISTRICT OF CALIFORNIA

19
20 IN RE TESLA, INC. SECURITIES
21 LITIGATION

Case No. 3:18-cv-04865-EMC

22 **REPLY IN SUPPORT OF DEFENDANTS'**
23 **EMERGENCY MOTION TO COMPEL**
24 **SUPPLEMENTAL EXPERT REPORTS**
25 **AND DEPOSITIONS**

26 **ORAL ARGUMENT REQUESTED**

27 Date: TBD

Time: TBD

Location: Courtroom 5, 17th Floor

Judge: Hon. Edward Chen

1 Plaintiff's filing today only compounds the problem and does nothing to moot Defendants'
2 Emergency Motion to Compel Supplement Expert Reports and Depositions. Instead, it further
3 muddies the water and highlights Plaintiff's ever-shifting expert opinions and failures to comply with
4 the Court's Orders and Plaintiff's own prior agreements—despite *months* of time to do so.

5 Over three months ago (on September 20), Defendants filed a motion in *limine* alerting the
6 Court to the unreliability of Professor Heston's options damages model, which utilized *theoretical*
7 options prices rather than *actual* options prices. (ECF No. 479.) During oral argument on
8 Defendants' motion, the Court questioned, "why not use the *actual* option prices?" (Batter Decl., Ex.
9 C at 36:19-20.) In response, Plaintiff agreed, "if the Court's concern is [that Heston's methodology is]
10 not sufficiently supported and would rather-- if the Court's preference is that we use actual prices, *we*
11 *[will] use actual prices.*" (*Id.* at 53:16-18.) That was *two months ago*, and since then, Plaintiff has
12 provided nothing—no new disclosures, no new calculations, and no supplementary data whatsoever.

13 The Court issued its Order on Defendants' motion on December 7, stating that Heston's
14 approach of using "theoretical prices . . . appears to be unprecedented, and poses serious *Daubert*
15 issues." (ECF No. 508 at 36.) Nevertheless, the Court did not grant Defendants' motion "*because*, in
16 light of these concerns, during the pretrial conference *Plaintiff agreed* to rerun the stock option
17 calculations using actual option price data instead of the theoretical prices." (*Id.* at 36-37 (emphasis
18 added).) Plaintiff has never followed through with its agreement or the Court's resulting order,
19 despite months to do so.

20 Instead, Plaintiff announced informally (in a phone call and email) that he would be changing
21 Heston's and Hartzmark's expert opinions in *other* material ways *not* considered by the Court. (Batter
22 Decl., Ex. D at 4.) Specifically, despite serving expert disclosures more than a year ago that relied on
23 "but-for" implied volatility to estimate "but-for" options prices, Plaintiff stated—with no justification
24 or the required formal disclosures—that he would scrap that and "just use *actual* reported implied
25 volatility for all calculations of option damages." (*Id.*) Defendants' experts worked tirelessly to
26 understand the significant implications of Plaintiff's eleventh-hour change to their expert
27 methodologies and how it would impact the damages Plaintiff claims the class is entitled to, all
28 without actual disclosures or calculation. Meanwhile, despite repeated requests, Plaintiff refused to

1 give any further meaningful information, the required Rule 16 disclosures, or the depositions that are
2 necessary to understand Plaintiff's new theory and *why* Plaintiff adopted this theory on the eve of trial.
3 (*Id.* at 1-5.) Plaintiff's refusal necessitated Defendant's Emergency Motion.

4 Yesterday, in response to Defendants' Emergency Motion, the Court issued an Order that, (1)
5 with respect to Plaintiff's recent decision to use *actual* implied volatility, Plaintiff "shall explain, *inter*
6 *alia*, why such amendment is not barred by Rule 16," and (2) "with respect to the use of actual market
7 data for options pricing, as opposed to the theoretical prices discussed at the last hearing, Plaintiff
8 shall explain why it should not be required to provide discovery and file a supplemental report thereon
9 in advance of trial." (ECF No. 516.)

10 Rather than attempt to comply with the Court's Order, Plaintiff is apparently abandoning his
11 new approach and going back to what Plaintiff said he would do months ago. However, Plaintiff still
12 has not provided any disclosures or indicated he will allow discovery into the proposed revised
13 methodology that mooted Defendants' prior *Daubert* challenge to Heston. Defendants are entitled to
14 know what the alleged damages figures are well before trial and should not have to question Plaintiff's
15 experts on their figures for the first time at trial. As the Court noted in its December 21 Order,
16 Plaintiff has not provided the required Rule 16 disclosures. Nor has the Plaintiff provided any updated
17 damage figures at all regarding options. Plaintiff has had *two months* to do so but hasn't, nor has he
18 explained in response to the Court's Order why he has not done so.

19 This should be done in an orderly fashion. Plaintiff should be ordered to provide disclosures
20 and allow depositions. Defendants should be permitted to probe whether Plaintiff's experts' current
21 opinions are consistent with their prior ones, including, for example, whether Plaintiff's use of
22 "actual" trading data sufficiently accounts for the issues and "noise" that Plaintiff's own expert
23 previously claimed made actual trading data inappropriate. Defendants should be permitted to rebut
24 the new opinions and to challenge them on *Daubert* grounds if justified. This cannot possibly be done
25 within the time currently set for trial, and it has been caused by Plaintiff dragging his feet, changing
26 expert opinions (including today), and refusing to comply with disclosure and discovery obligations.
27 Plaintiff should either go to trial without an options damages opinion (as we are weeks away from trial
28 and an admissible one has not been disclosed) or Plaintiff should be ordered to immediately provide

1 the required expert disclosures and depositions and the trial date should be moved to ensure that
2 Defendants are not prejudiced by Plaintiff's gamesmanship on these central expert issues.

3
4 DATED: December 22, 2022

Respectfully, submitted,

5 QUINN EMANUEL URQUHART & SULLIVAN, LLP

6 By: /s/ Alex Spiro

7 Alex Spiro (appearing pro hac vice)
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ATTESTATION

I, Kyle K. Batter, am the ECF user whose ID and password are being used to file the above document. In compliance with the Local Rules, I hereby attest that Alex Spiro has concurred in the filing of the above document.

/s/ Kyle K. Batter

Kyle K. Batter